Supreme Court, U.S.
FILED
SEP 30 1996
OFFICE OF THE CLERK

No. 96-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,
v.
DAVID INGEBRETSEN, ON BEHALF OF HIMSELF and HIS DAUGHTER, ANNA INGEBRETSEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT B. McDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ELLIOT M. MINCBERG *
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

JOHN G. JONES
P.O. Box 9622
Jackson, Mississippi 39286
(601) 362-7555

Counsel for Respondents

* Counsel of Record

WILSON · EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

ACLU v. Blackhorse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996) (en banc) 10
Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 7
Bowen v. Kendrick, 487 U.S. 589 (1988) 9
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 8, 9
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 7
Edwards v. Aguillard, 482 U.S. 578 (1987) 7, 8, 9
Elrod v. Burns, 427 U.S. 347 (1976) 5
Engel v. Vitale, 370 U.S. 421 (1962) 7
Gearon v. Loudoun County School Board, 844 F. Supp. 1097 (E.D. Va. 1993) 10
Harris v. Joint School District No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995) 10
Ingebretsen, et al. v. Jackson Public School District, et al., 88 F.3d 274 (5th Cir. 1996) .... *passim*
Ingebretsen, et al. v. Jackson Public School Dist., et al., 864 F. Supp. 1473 (S.D. Miss. 1994) .... *passim*
Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) 5, 10
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *summarily aff'd, Treen v. Karen B.*, 455 U.S. 913 (1982) 7, 8
School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 7
Treen v. Karen B., 455 U.S. 913 (1982) 7, 8, 9
United States v. Salerno, 481 U.S. 739 (1987) 9
Wallace v. Jaffree, 472 U.S. 38 (1985) 7, 8, 9

UNITED STATES CONSTITUTION

First Amendment 5
The Establishment Clause .... *passim*

STATUTES

Mississippi School Prayer Law, Chapter No. 609, Laws of 1994, Miss. Code §§ 37-13-4, 37-13-4.1 .. *passim*
Miss. Code § 37-13-4.1(2) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-331

MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI,
Petitioner,

v.

DAVID INGEBRETSEN, ON BEHALF OF HIMSELF and HIS DAUGHTER, ANNA INGEBRETSEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the issuance of a preliminary injunction against the implementation of part of a 1994 Mississippi school prayer statute, Miss. Code §§ 37-13-4 and 37-13-4.1 (hereafter "the School Prayer Law"). In pertinent part, the School Prayer Law requires all public schools in the state to authorize "invocations, benedictions" and "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related student events, compulsory as well as non-compulsory. Miss. Code § 37-13-4.1(2).[1] As the court of appeals explained, the School Prayer Law thus "gives a preferential, exceptional benefit to religion that it does not extend to anything else."

---

[1] The full text of the School Prayer Law is set out in the appendix to the petition ("Pet. App.") at 64a-66a.

Ingebretsen v. Jackson Public School District, 88 F.3d 274, 279 (5th Cir. 1996), Pet. App. at 6a.

As the district court found, the School Prayer Law was enacted in response to a widely-publicized incident in which a public high school principal in Jackson, Mississippi authorized use of the school's public address system by students during the school day to recite prayers to all students at the school, who were required to be in their classrooms. The principal took this action despite having been previously advised by counsel for the Jackson Public School District that the practice was unconstitutional and improper. *Ingebretsen v. Jackson Public School District*, 864 F. Supp. 1473, 1478-79 (S.D. Miss. 1994), Pet. App. at 31a-34a. Following public expressions of support across the state for the actions of the principal, who had been disciplined for ignoring the advice of the school district's counsel, the Mississippi Senate passed a resolution in March 1994 commending the principal for his actions as the "catalyst for a renewed effort all over this state and nation to return prayer to our public schools." Pet. App. at 33a-34a, 864 F. Supp. at 1479. Several days later, the state Senate and the House of Representatives passed the School Prayer Law, which was to take effect on July 1, 1994. Pet. App. at 34a, 864 F. Supp. at 1479.

This lawsuit was filed by the respondents on July 15, 1994, approximately one month prior to the start of the 1994-1995 school year. Respondents include students enrolled in the Jackson public schools, parents of those students in their capacities as parents and taxpayers, and the American Civil Liberties Union of Mississippi, suing on its own behalf and on behalf of its members and their minor children. Pet. App. at 30a, 864 F. Supp. at 1477. The Complaint contends that the statute violates the Establishment Clause, and seeks permanent injunctive and declaratory relief. Pet. App. at 70a-76a. A motion for a preliminary injunction to preserve the status quo was filed simultaneously with the Complaint.

The original defendants in this action were the Attorney General of Mississippi (petitioner herein) and the Jackson Public School District and its Board of Trustees. The Attorney General opposed the motion for a preliminary injunction and filed a motion to dismiss the Complaint.[2] The School District admitted the facts pleaded in the Complaint and conceded that, absent an injunction, the new law would be invoked once school began; otherwise, it took no further position in the case. 1 R. at 25.[3] The case was assigned to the Honorable Henry T. Wingate.

On August 4, 1994, Judge Wingate heard oral argument on the plaintiffs' motion for a preliminary injunction and on the Attorney General's motion to dismiss. On August 11, 1994, Judge Wingate issued a Memorandum Opinion and Order in which he concluded that the new statute had serious constitutional problems and temporarily enjoined the law pending a further hearing to consider, *inter alia*, the possibility of severing those portions of the law that were unconstitutional. 1 R. at 80, 87-88. On August 16, 1994, Judge Wingate conducted an evidentiary hearing and heard further argument. Respondents submitted documentary evidence to the court and called as witnesses the Interim Superintendent of the Jackson Public School District, Dr. Dan Merritt, as well as Dr. Emanuel Reeves, a high school principal in the Jackson Public School District, each of whom has had more than 25 years of experience in the schools. (3 R. at 5-6, 39-41). The Attorney General called no witnesess.

On September 2, 1994, the court denied the Attorney General's motion to dismiss and granted, in part, the plaintiffs' motion for a preliminary injunction. In granting partial preliminary relief, the district court found a sub-

---

[2] The motion to dismiss asserted a host of alleged bars to the consideration of this case, including abstention, an alleged lack of state action, a challenge to the respondents' standing, and the assertion that no case or controversy existed. Pet. App. at 36a-37a, 864 F. Supp. at 1480.

[3] "R." refers to the three-volume record below.

stantial threat that, absent such relief, the statute would be invoked once school began:

> The testimony of Dr. Merritt and Dr. Reeves that they constantly have been besieged by student requests to have public, classroom prayer and that they reasonably expect many students to act under the school-prayer statute at issue here amply demonstrates that the risk of injury is neither remote nor speculative.

Pet. App. at 42a, 864 F. Supp. at 1482 (transcript citations omitted).[4] The court explained that its conclusion was further supported by evidence regarding the events in Jackson that led to passage of the School Prayer Law, including the public support by students and adults of the intercom prayers. Pet. App. at 42a, 864 F. Supp. at 1482-83. Indeed, the defendant Jackson Public School District conceded in its response to the plaintiffs' motion for a preliminary injunction that "[t]here can be no doubt that the state law challenged here will be invoked by administrators, teachers or students when school starts." 1 R. at 25.

---

[4] Dr. Reeves and Dr. Merritt also testified that "the statute as written would disrupt instructional and educational activities throughout the District." Pet. App. at 51a-52a, 864 F. Supp. at 1487. Based on their testimony, the district court found that "these eminent educators reasonably apprehend that the effect of this far-sweeping statute would cause disharmony, confusion, and upset." Pet. App. at 52a, 864 F. Supp. at 1487. As he did unsuccessfully in the court of appeals, petitioner attempts to invite this Court to second-guess the district court's findings by relying on a small portion of the testimony, taken out of context and selectively reprinted in the Appendix, which allegedly shows that Dr. Reeves and Dr. Merritt lacked "personal knowledge" of the likelihood that the statute would be invoked once school began. Pet. at 4 n.3. In fact, these transcript excerpts reveal merely that at the time of the hearing, August 16, 1994, three days after the end of summer recess, no specific student had come to either witness and expressly stated that he or she would have invoked the School Prayer Law had it not been enjoined on August 4. Pet. App. at 77a-78a.

In ruling on respondents' preliminary injunction motion, the district court specifically analyzed each part of the statute that respondents contended violates the Establishment Clause and sought, as requested by petitioner, to avoid a construction that would invalidate the law. Pet. App. at 38a, 50a-60a, 864 F. Supp. at 1481, 1486-1491. After applying the familiar four-part test for determining whether to grant preliminary relief, the court preliminarily enjoined the School Prayer Law, except for the portion of the law authorizing "nonsectarian, nonproselytizing student-initiated voluntary prayer at high school commencement." Pet. App. at 63a, 864 F. Supp. at 1492. That portion of the law, the court explained, appeared to be constitutional based on the prior decision of the court of appeals in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). *Id.*

With respect to the remainder of the School Prayer Law, the court found that respondents had demonstrated a substantial likelihood of success on their First Amendment claims based on all five of the criteria used by the court of appeals and by the members of this Court in evaluating Establishment Clause claims.[5] The court further found that respondents had "adequately demonstrated that they would suffer irreparable injury" if the statute were not enjoined, specifically citing this Court's admonition in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pet. App. at 60a, 864 F. Supp. at 1491.

---

[5] As recited by the district court, those five tests involve a determination of whether the purpose of the statute or practice at issue is predominantly secular; whether the statute or practice would have a primary effect that advances or inhibits religion; whether it would result in excessive government entanglement with religion; whether it constitutes government endorsement of religion; and whether it would have a coercive effect on students in terms of religious exercise. Pet. App. at 49a-50a, 864 F. Supp. at 1486.

Petitioner appealed from the September 2, 1994 Order partially granting the preliminary injunction and denying his motion to dismiss, and respondents cross-appealed from that portion of the Order denying the preliminary injunction with respect to high school graduations. On January 10, 1996, the Fifth Circuit affirmed the district court's ruling in full. The court's opinion specifically noted that the preliminary injunction "affected only the School Prayer Statute and would not affect students' existing rights to the free exercise of religion and free speech." Pet. App. at 8a, 88 F.3d at 280. On May 31, 1996, the court denied the petitioner's Suggestion for Rehearing En Banc. The Petition for a Writ of Certiorari was filed on August 29, 1996.

REASONS FOR DENYING THE WRIT

Petitioner has failed to advance a sound reason why this Court should consider the questions that he contends are raised by the decision of the court of appeals. He alleges no conflict among the circuits on these questions. He shows no departure from this Court's decisions in the lower courts' resolution of the asserted questions, nor any justification for this Court to overrule the precedents that control those questions. In addition, the procedural posture of this case, involving a partial grant of a preliminary injunction based on an evidentiary hearing, factual findings by the district court, and statutory analysis by the courts below of separable portions of the School Prayer Law, makes it particularly inappropriate for review by this Court.

1. Stripped of its hyperbole and its florid rhetoric, the petitioner's brief first asserts that the respondents lacked standing to bring this action, and that no "ripe" case or controversy exists. After conducting an evidentiary hearing, however, the district court found as a matter of fact that the School Prayer Law was likely to be invoked absent preliminary injunctive relief, that respondents would "suffer irreparable injury," and that this risk of

injury was "neither remote nor speculative." Pet. App. at 60a, 42a, 864 F. Supp. at 1491, 1482. The court of appeals agreed. Pet. App. at 4a, 88 F.3d at 278. The district court's factual findings are of course entitled to deference. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). In addition, the issuance of a preliminary injunction itself is reviewed only for an abuse of discretion. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). Thus, petitioner's assertions regarding standing and ripeness, which the lower courts found to be meritless, raise no important question for this Court.

2. With respect to the respondents' standing, the courts below followed the well-established precedents of this Court and the lower federal coutrs recognizing that parents and students have the requisite stake in the outcome of challenges to public school prayer and similar statutes and practices under the Establishment Clause to satisfy standing requirements. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (challenge by parents to law authorizing "equal time" for teaching creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (challenge by parent to "moment of silence"-for-school-prayer statute); *Treen v. Karen B.*, 455 U.S. 913 (1982), *summarily affirming Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (challenge by parents to school prayer statute and regulation); *School District of Abington Township v. Schemmp*, 374 U.S. 203 (1963) (challenge by parents and students to government-endorsed school prayer and Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (challenge by parents to government-sponsored school prayer). Indeed, it would be difficult to imagine plaintiffs with a greater stake in the outcome of such cases than the parents and students of the local public schools affected by the statute or practice at issue.

Likewise, in rejecting petitioner's contention that no "ripe" case or controversy existed, the lower courts properly followed the clear precedents of this Court permitting

the adjudication of facial challenges to statutes or practices as violative of the Establishment Clause, including challenges brought prior to implementation. *See, e.g., Edwards v. Aguillard, supra* (successful pre-implementation facial challenge to state statute mandating "equal time" for creationism if evolution is taught); *Wallace v. Jaffree, supra* (successful facial challenge to state statute authorizing a moment of silence specifically for prayer in school); *Treen v. Karen B., supra* (successful facial challenge to school prayer practice that had "yet to be put into effect," *Karen B. v. Treen*, 653 F.2d at 902); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (successful pre-implementation facial challenge to statute providing tuition reimbursement and tax benefits to parents of children attending religious schools). Petitioner has offered no reason to review this case in light of the consistent decisions by this Court.[6]

3. Petitioner's complaint about the manner in which the courts below reviewed the School Prayer Law on its face similarly raises no important issue for this Court. Both courts properly evaluated respondents' Establishment Clause challenge to the statute exactly as this Court has instructed, using precisely those tests set out by the Court

---

[6] Although petitioner complains that the School Prayer Law had not and in theory might not be implemented, this Court has struck down statutes under the Establishment Clause in similar circumstances. For example, the statute held to be facially unconstitutional in *Edwards v. Aguillard* did not mandate the teaching of either evolution or creationism, but provided only for "equal time" for creationism *if* evolution were taught. 482 U.S. at 581. Thus, the statute might theoretically never have been implemented. Petitioner's argument implies not only that *Edwards* and numerous other decisions were incorrect, but also that there could never be a preliminary injunction in an Establishment Clause challenge to a statute. Particularly where, as here, the lower courts found a substantial likelihood that the School Prayer Law *would* be implemented absent preliminary relief and that irreparable injury would occur absent such relief, there is no justification for this Court to review the decisions below.

for reviewing similar facial challenges to a law under the Establishment Clause. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); *Edwards v. Aguillard, supra*, 482 U.S. at 582-85; *Wallace v. Jaffree, supra*, 472 U.S. at 55-56; *Treen v. Karen B., supra*; *Committee for Public Education and Religious Liberty v. Nyquist, supra*, 413 U.S. at 772-74. The decision below is therefore consistent with a long line of decisions by this Court.

4. Petitioner fails to adduce even a single decision by this Court or any court of appeals holding that the methodology employed in *United States v. Salerno*, 481 U.S. 739 (1987), should be applied instead in Establishment Clause cases or that the established method of analysis utilized below was erroneous.[7] Even assuming, *arguendo*, that petitioner's question regarding *Salerno* merited consideration by this Court in an appropriate case, that question is not squarely presented here. Because the School Prayer Law contains a severability clause, the courts below in fact effectively performed a *Salerno*-type analysis by considering in what circumstances, if any, the statute could constitutionally be applied and then severed those portions.[8]

---

[7] Petitioner's effort to reconcile *Bowen* with *Salerno* (Pet. at 15-16 n.14) cannot withstand scrutiny. The opinion of the Court in *Bowen*, written by Chief Justice Rehnquist, who was also the author of *Salerno*, never even mentions *Salerno*. Instead, it articulates the various tests used to adjudicate a facial challenge to a statute under the Establishment Clause, 487 U.S. at 602, tests (such as examining the purpose of a statute) that bear no relationship to *Salerno*, which evaluates the facial validity of a statute by considering only whether the statute may be constitutionally applied. Moreover, as explained in Justice Blackmun's dissent in *Bowen*, the defendant in that case had argued to this Court that the court of appeals had erred by not utilizing the methodology of *Salerno*. 487 U.S. at 627 n.1. Justice Blackmun expressly agreed with the implicit holding of the majority that *Salerno* was inapplicable, finding it to be "wholly incongruous" with the Court's Establishment Clause jurisprudence. *Id.*

[8] Indeed, petitioner expressly urged the district court to adopt a severability approach to the statute if it found any portion of the statute to be unconstitutional. Pet. App. at 68a.

Specifically, the district court held an initial hearing on plaintiffs' preliminary injunction motion just prior to the start of the 1994-95 school year, and concluded that while the statute had "a constitutional defect" in some respects, it could also be applied constitutionally to high school graduation ceremonies in light of *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), which upheld a school district policy permitting "student-initated" prayer at high school graduations. 1 R. at 80, 86-87 (Memorandum Opinion and Order of Aug. 11, 1994). The court then held "a supplemental hearing to determine what portion of the statute, if any, could escape the injunction by its severability clause." Pet. App. at 4a, 88 F.3d at 278. Following the hearing, the court held that the School Prayer Law was constitutional insofar as it applied to high school graduation ceremonies, and *refused* to enjoin the statute in that respect. The Fifth Circuit affirmed.[9] The lower courts thus conducted precisely the type of "narrow, case-by-case adjudication" that petitioner claims is appropriate in a case such as this (Pet. at 16). For this reason as well, review clearly is not warranted.

5. Petitioner concludes with an improper effort to discuss the merits of the Establishment Clause in this case, which petitioner has chosen *not* to raise as a question for review, in an attempt to mischaracterize what this case is and is not about. Pet. at 18-19. This lawsuit challenges the constitutionality of the enactment of a statute by the state of Mississippi, nothing more and nothing less. It does not, as petitioner erroneously suggests, seek

---

[9] For the record, respondents do not agree that *Jones* properly interprets the Establishment Clause. *See ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc); *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995); *Gearon v. Loudoun County School Board*, 844 F. Supp. 1097 (E.D. Va. 1993). However, this issue is not presently before the Court.

to bar the private speech of private actors, nor to deprive any students of any independently existing constitutional right to pray in public schools. As the court of appeals recognized, the preliminary injunction affects only the School Prayer Law and not "students' existing rights to the free exercise of religion and free speech. Therefore, students continue to have exactly the same constitutional right to pray as they had before the statute was enjoined." Pet. App. at 8a, 88 F.3d at 280. The district court likewise explained:

> as acknowledged by the Attorney General, the students' rights of Free Speech and Free Exercise are pre-existing and, as such, the granting of an injunction would have no bearing on the students' ability to freely exercise their pre-existing rights. An injunction would not prevent students from praying silently alone or assembling together to pray before or after school. In fact, Dr. Reeves testified that Provine High School, across town from Wingfield High, presently allows a student prayer group to meet on the school grounds for the purpose of having morning prayers.

Pet. App. at 45a, 864 F. Supp. at 1484. Petitioner has simply failed to justify review of the decisions below by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ELLIOT M. MINCBERG *
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 467-4999

JOHN G. JONES
P.O. Box 9622
Jackson, Mississippi 39286
(601) 362-7555

Counsel for Respondents

September 30, 1996

* Counsel of Record